No. 10,749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. S. CASE, doing business as L. S. Case Company, and TRAVELERS INSURANCE COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and DAVID M. YOUNG,

Appellees.

REPLY BRIEF FOR APPELLANTS.

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FOREWORD.

This reply brief is presented under the main subdivision heading adopted in the opening brief.

THE COMPENSATION ORDER WAS NOT IN ACCORDANCE WITH LAW IN AWARDING THE EMPLOYEE $750 FOR SERIOUS FACIAL AND HEAD DISFIGUREMENT, AND THE DECREE AFFIRMING THE AWARD SHOULD BE REVERSED WITH DIRECTIONS TO THE DISTRICT COURT TO SET ASIDE THE AWARD OF $750.

The appellees agree with appellants that the sole question before the court is one of construction of the Longshoremen's Act. That question was summed up at pages 7 and 8 of appellants' opening brief as follows: *Is the said Act reasonably susceptible to the construction that an employee is entitled to additional compensation for blemish to an eye when he has been awarded the full compensation to which he was entitled had the eye been removed?*

The appellees, like the appellants, have not been able to find any federal decision directly answering the question. But if the Deputy Commissioner misconstrued the Act and gave a distorted meaning to the terms thereof, the law is plain that the award should be set aside. (*Norton v. Warner Co.,* 321 U. S. ....., 64 S.Ct. 747, 750, 751, 88 L.Ed. Adv. Op. 606.)

In their opening brief the appellants cited a number of decisions by state courts construing analogous state statutes, and supporting the position of appellants that the Longshoremen's Act was not reasonably susceptible to the construction given it by the Deputy Commissioner. They were not cited on the theory that they were binding on this court. They were cited because of the persuasive and logical reasoning they contained.

In turn, appellees counter with decisions by other state courts and assert that they sponsor and support a

contrary construction. It may be mentioned that the subject of "Compensation for Disfigurement" is extensively annotated in 80 A.L.R. 970 and 116 A.L.R. 712, and that appellees, like appellants, have drawn freely on the cases there collected. Naturally, and as the said annotations point out, the decisions by the state courts hinge on the wording of the particular statutes construed. Some decisions cited by appellees were concerned with statutes containing the term *"additional"*, and thereby expressly authorizing *additional* compensation of the character under discussion. Other decisions cited by appellees were concerned with statutes which, although not using the term *"additional"*, nevertheless contained language to the same effect.

The word *"additional"* is not contained in subdivision 20 of subsection (c) of section 8 of the Longshoremen's Act of 1927 (33 U.S.C.A., sec. 908) authorizing an award of compensation for "serious facial or head disfigurement". What is therefore plain is that the appellees are asking this court to do what Congress did not do and write the word *"additional"* into the said subdivision. The obvious result of the writing-in process would be to exclude from the benefits of the Act those whom it is manifest that Congress intended to benefit. If only a person entitled to compensation under some other subdivision of said subsection (c) is entitled to compensation for "serious facial or head disfigurement" under said subdivision 20, that is, *"additional"* compensation, then those whose only injury consists in "serious facial or head disfigurement" will be excluded from the benefits of the Act. A rea-

sonable construction of the Act must therefore necessarily lead to the conclusion that the various subdivisions of said subsection (c) are exclusive and neither cumulative nor designed to permit double or additional recovery or compensation by an employee for compensated injury.

This may be further demonstrated by considering other language in said subdivision (c). All the subdivisions thereof have reference to "*permanent* partial disability". Hence any award under subdivision 20 must be confined to "serious facial or head disfigurement" of a *permanent* character. If an eye is injured to the extent that it must be removed, or if it is injured to an equivalent extent, how can any Deputy Commissioner say that a blemish to the eye is *permanent?* If it is uncertain whether the eye is to be removed, then it is equally uncertain whether disfigurement caused by a blemished condition of the eye is *permanent.* Therefore, when such uncertainties exist, no award can properly be made under said subdivision 20.

By the express terms of subsection (c) the loss of an eye, the loss of the use of an eye, the loss of 80% of the vision of an eye, are deemed the equivalent of each other and equivalently compensable, namely, by 66⅔ per centum of the average weekly wages for one hundred and forty weeks. As it is obvious that such compensation is the limit of compensation for the removal of an eye, blemish or unblemished, it necessarily follows that it is also the limit of compensation for the loss of the use of an eye, blemished or unblem-

ished, or for the loss of 80% of the vision of an eye, blemished or unblemished.

The appellees point out at page 7 of their brief that the Longshoremen's Act was patterned on the Workmen's Compensation Laws of the state of New York, and assert that "the decisions of the New York Courts construing the New York workmen's compensation law are of greater importance as precedents than the decisions of other jurisdictions".

The correct rules were stated by this court in *Twin Harbor Stevedoring & Tug Co. v. Marshall,* 103 F. 2d 513, as follows, at page 516:

> "The provisions of sec. 8 (c) and (e) of the Longshoremen's Act were taken from sec. 15 of the Workmen's Compensation Laws of the state of New York, Consol. Laws, c. 67. Candado Stevedoring Corp. v. Locke, 63 F. 2d 902. It is claimed that at the time of the enactment of the Longshoremen's Act these provisions of the New York statute had a known and settled construction to the effect that an employee is entitled to no award of compensation where he has suffered no decrease of wages because of an injury, a construction Congress must be deemed to have adopted. (Cases cited.) A number of New York cases are cited which are said to support this rule. Four of them were decided prior to the passage of the federal act on March 4, 1927. * * * The only New York case prior to 1927 which in any way tends to support the position of appellants is Pottle v. William H. Atkinson Co., 1925, 215 App. Div. 739, 212 N.Y.S. 902, in which the Supreme Court of New York, Appellate Division, rendered a memorandum decision reversing and remitting an award

'on the ground that the award is made for a period during part of which claimant was employed, and for which he received his regular pay. That case, sketchy and truncated as the decision is, cannot fairly be said to have established a known and settled construction of the character contended for. And compare Candado Stevedoring Corp. v. Locke, supra.

Conceding that the later New York decisions have laid down such rule, they are inapposite for the purpose of determining historically the Congressional intent.''

At page 8 of their brief the appellees quote from a special bulletin of the New York Department of Labor, wherein 5 cases on the subject of disfigurement are cited. They are all memorandum opinions of the character termed "sketchy and truncated" by this court in the Twin Harbor Case. They are legally inapposite because they reflect decisions subsequent to the enactment of the Longshoremen's Act on March 4, 1927. They are factually inapposite because none of them involved compensation for a condition caused by blemish to an eye. In *Ackerman v. New East 97th St. Garage,* 224 App. Div. 681, the award was for a staring appearance and retraction about a glass eye. In *Berchenke v. Miller,* 223 App. Div. 681, the award was for a tick or spasm of an eye. In *Gibbs v. Czapela,* 224 App. Div. 799, the award was for immobility and other defects of a glass eye substituted for an eye that had been removed. In *Partridge v. Tew Motor Sales Co.,* 222 App. Div. 787, the award was for burns to the tissues of the face caused by sulphuric acid. And in

Lipton v. Victor X-ray Corp., 36 State Dept. 697, the opinion is so vague that all that can be determined is that an award was made for some sort of serious *permanent* facial disfigurement.

In addition to quoting from the said special bulletin, the appellees (pp. 5, 9) cite *American Knife Co. v. Sweeting,* 250 U.S. 596. The case is not helpful. All that it holds is that the provision of the New York Workmen's Compensation Laws authorizing compensation for serious *permanent* facial or head disfigurement, is constitutional. Here the sole question is one of construction.

The New York law on the subject of disfigurement *prior* to the enactment of the Longshoremen's Act on March 4, 1927, is presented in 80 A.L.R. 970, where it was said, at pages 970 and 975:

> (970) "It has been held that an allowance for serious facial or head disfigurement, so far as such disfigurement has no relation to disability, is an anomaly. (Sweeting v. American Knife Co. (1919) 226 N.Y. 199, 123 N.E. 82.)"
>
> (975) "In Erickson v. Preuss (1918) 223 N.Y. 365, 119 N.E. 555, 16 N.C.C.A. 481, the view was expressed that concurrent awards might be made, one for serious facial or head disfigurement (under the 1916 Amendment) and one for disability or loss of earning power, an award for facial disfigurement before any determination as to loss of earning power being upheld in that case, and it being said that it should clearly appear, as it did, that the disfigurement award did not include anything for diminished earning power.

It was stated in New York C.R. Co. v. Bianc (1919) 250 U.S. 596, 63 L.Ed. 1161, 40 S.Ct. 44, 19 N.C.C.A. 633, that there was no specific finding of impairment of earning power in either that (Erickson) case or the cases reviewed in the Supreme Court.

The Erickson Case (1918) 223 N.Y. 365, 119 N.E. 555, 16 N.C.C.A. 481, was regarded in Clark v. Hayes (1924) 207 App. Div. 560, 202 N.Y.S. 453 (affirmed, without opinion, in (1924) 238 N.Y. 553, 144 N.E. 888), as no longer binding in view of the decision in Sweeting v. American Knife Co. (1919) 226 N.Y. 199, 123 N.E. 82 (affirmed in New York C.R. Co. v. Bianc (1919) 250 U.S. 596, 63 L.Ed. 1161, 40 S.Ct. 44, 19 N.C.C.A. 633), in which it was said there were four judges out of seven who were of the opinion that an award for disfigurement was related to loss of earning capacity. And it was held in the Hayes Case that an award for disfigurement could not be made in addition to one for permanent total disability, but only in case of permanent partial disability. It was said: 'Subdivision 3 of section 15 relates to permanent partial disability. Paragraph "t" of this subdivision is the statutory authority which permits the board to award compensation for facial or head disfigurement . . . Had the legislature intended that this particular item of permanent partial disability could be made the subject of an additional award in a case of permanent total disability it could very readily have evidenced such an intention. It appears to have evidenced the contrary.'

In the absence of evidence that a disfigurement was serious and permanent, an award was re-

versed in Chambers v. Roulston (1925) 214 App. Div. 825, 210 N.Y.S. 638."

It is therefore apparent that the pertinent New York law is squarely opposed to double compensation and squarely opposed to any award for facial or head disfigurement where uncertainty exists as to the condition being *permanent.* Otherwise stated, the pertinent New York law supports the position of appellants as to the construction which should be given the Longshoremen's Act.

CONCLUSION.

For the several reasons appearing in the opening brief and herein supplemented, it is therefore again respectfully submitted that the judgment herein should be reversed with directions to the district court to set aside that part of the compensation order of the deputy commissioner awarding the employee $750 for facial and head disfigurement.

Dated, San Francisco,
August 14, 1944.

R. P. WISECARVER,
Proctor for Appellants.